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in the Supreme Court of the United States

OCTOBER TERM 1972

NO. 72-1283

MR. BOSTON DISTILLER CORP. and CONSOLIDATED DISTRIBUTORS OF TAMPA, INC.,

Petitioners,

vs.

RICHARD A. PALLOT, JACK C. DEMETREE, NELSON A. ITALIANO, B. W. SIMPKINS, and J. H. BAROCO, as members of and constituting the BOARD OF BUSINESS REGULATION of the State of Florida,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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and
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MIAMI REVIEW — 371-4853 — 377-3721

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Supreme Court
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OCTOBER TERM 1972

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RICHARD A. PALLOT, JACK C. DEMETREE, NELSON A. ITALIANO, B. W. SIMPKINS, and J. H. BAROCO, as members of and constituting the BOARD OF BUSINESS REGULATION of the State of Florida,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the Opinion and Judgment of that Court denying

their appeal from the dismissal of their Complaint in the United States District Court for the Northern District of Florida.

OPINIONS BELOW

The Petitioners' Complaint filed in the United States District Court for the Northern District of Florida, Tallahassee division, was dismissed *sua sponte* by that Court by Order dated May 22, 1972 and re-printed as appendix A hereto. Petitioners appealed the Order of Dismissal to the United States Court of Appeals for the Fifth Circuit. That Court transferred the case to the Summary Calendar and without oral argument affirmed by Opinion dated November 1, 1972, reported 469 F.2 337 and re-printed as appendix B hereto. A timely filed Petition for Rehearing was denied by an Order dated December 19, 1972, reported __ F.2 __ and re-printed as appendix C hereto.

GROUNDS FOR JURISDICTION

Jurisdiction in this Court is asserted under Title 28 USC, §1254(1). The Judgment sought to be reviewed was entered November 1, 1972, and rendered December 19, 1972, when the Petition for Rehearing was denied.

QUESTIONS PRESENTED FOR REVIEW

I

CAN THE ABSTENTION DOCTRINE BE APPLIED TO A CASE TO WHICH THE TAX INJUNCTION ACT, TITLE 28 USC, §1341

APPLIES TO DENY JURISDICTION IN A FEDERAL DISTRICT COURT TO PASS UPON FEDERAL CONSTITUTIONAL RIGHTS AFTER STATE COURTS HAVE DENIED RELIEF?

II

CAN THE DOCTRINE OF RES JUDICATA BE APPLIED TO A SUIT WHERE THE PARTIES IN THE SUIT ON THE BASIS OF WHICH RES JUDICATA IS ASSERTED ARE NOT IDENTICAL TO THE PARTIES IN THE SUIT AT BAR?

III

CAN A SINGLE JUDGE OF A UNITED STATES DISTRICT COURT REFUSE TO REQUEST THE CONVENTION OF A THREE JUDGE DISTRICT COURT WHERE THERE IS NO QUESTION BUT THAT THE ALLEGATIONS OF THE COMPLAINT RAISE A SUBSTANTIAL QUESTION OF CONSTITUTIONALITY?

STATEMENT OF THE CASE

Petitioners filed their Complaint in the United States District Court for the Northern District of Florida, Tallahassee division, seeking relief by way of injunction and declaratory decree against a Florida taxing statute. The Complaint, together with the Exhibits thereto is re-printed as appendix D hereto.

The Complaint asserts and demonstrates to a point of certainty that the Florida Taxing Statute involved in this case is blatantly arbitrary, discriminatory and violative of the equal protection and due process clauses and has cost over a quarter of a million dollars in taxes to Petitioners and particularly to the Petitioner, Mr. Boston Distiller Corp.

Petitioners were, of course, required to demonstrate jurisdiction in the United States District Court. Because they sought relief against a state taxing statute, they were required to show that the provisions of the Tax Injunction Act, Title 28 USC, §1341 did not apply to this case. That act provides as follows:

> "The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State Law where a plain, speedy and efficient remedy may be had in the courts of such state."

Petitioners met the statute by asserting that they had exhausted their State remedies through the highest court of the State of Florida, the Florida Supreme Court. In fact, the Circuit Court (or trial court in Florida) had declared the statute unconstitutional, but the Supreme Court of Florida reversed. Petitioners attached to their Complaint copies of the unreported Opinion of the Circuit Court and the Opinion of the Supreme Court of Florida reported at 245 So.2 240. Those Opinions are re-printed as Exhibits 1 and 2 to appendix D to this Petition.

The District Court dismissed the Complaint *sua sponte* by Order, appendix A hereto, asserting that the Absten-

tion Doctrine destroyed jurisdiction in the Federal District Court.

On appeal, the Fifth Circuit saw fit to transfer the case to the Summary Calendar and affirm, asserting *res judicata*. See appendix B hereto.

A timely filed Petition for Rehearing pointed out to that Court that res judicata is a doctrine that does not apply unless there is an identity of parties under that Court's own Opinion in *Elliott Advertising vs. Metropolitan Dade County*, 422 F.2 1141 (5th Cir. 1970). A laconic denial of the Petition followed (see appendix C hereto) and this Petition results.

STATUTORY AND CONSTITUTIONAL PROVISIONS

A. The Tax Injunction Act, 28 USC 1341, has previously been set out in the Statement of Facts.

B. Portions of Florida Statutes 561.46 and 561.463 are printed in their entirety in appendix D hereto.

C. Petitioners rely upon the provisions of the Constitution of the United States Amendment XIV, §1 which provides as follows:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT

I

CAN THE ABSTENTION DOCTRINE BE APPLIED TO A CASE TO WHICH THE TAX INJUNCTION ACT, TITLE 28 USC, §1341 APPLIES TO DENY JURISDICTION IN A FEDERAL DISTRICT COURT TO PASS UPON FEDERAL CONSTITUTIONAL RIGHTS AFTER STATE COURTS HAVE DENIED RELIEF?

This case presents a question which affects all litigation respecting the validity of State taxes under Federal Constitutional provisions. It is a question which has never been determined by this Court, or by any Court of Appeals prior to the decision to which this Petition is addressed.

These Petitioners questioned the constitutionality of a State taxing statute as it was applied to them.

Normally, the Petitioners would have a choice of jurisdiction between the Florida State Courts and the Federal District Court under the provisions of Title 28 USC, §1331 (a) giving the District Court original jurisdiction of civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the constitution, laws or treaties of the United States.

However, the jurisdiction of the District Court was limited by the Tax Injunction Act, §1341 of Title 28.

Since there was a remedy in the Courts of Florida which was concededly plain and speedy, Petitioners repaired to those Courts to seek relief. The Circuit Court of Florida granted relief; the Supreme Court of Florida denied relief and upheld the constitutionality of the statute.

At this point in time, the remedies in the State Courts were demonstrably not efficient.

The Petitioners then filed the instant suit in the Federal District Court and were told by the Federal District Judge in his Order dismissing the case for want of jurisdiction, that the Abstention Doctrine barred the suit.

The Abstention Doctrine is a judge made rule and is grounded on the premise that a party has voluntarily submitted his claims to the jurisdiction of the State Courts. Petitioners are unable to find a case where the Abstention Doctrine has been applied to a situation where there was not initial concurrent jurisdiction between State and Federal courts.

In *England vs. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L.Ed. 2d. 440 (1964) this court said:

> "The line drawn should be bright and clear, so that litigants shunted from Federal to State Courts by application of the Abstention Doctrine will not be exposed, not only to unusual expense and delay, but also to procedural traps operating to deprive them of their right to a District Court determination of their federal claims. It might

be argued that nothing short of what was done in Buttons should suffice—that a litigant should retain the right to return to the District Court unless he not only litigates his federal claims in the State Tribunals but seeks review of the State decision in this Court. But we see no reason why a party, after unreservedly litigating his federal claims in the State Courts *although not required to do so*, should be allowed to ignore the adverse State decision and start all over again in the District Court." [Emphasis added]

In the case at bar, it cannot be said that the Petitioners elected the State Forum, or that they voluntarily resorted to it. The Tax Injunction Act deprived the District Court of jurisdiction as long as there was the possibility of a State Court remedy. Unless and until they exhausted their State Court remedies, or were able to demonstrate that such remedies were non-existent, these Petitioners could not have brought an action in the District Court.

However, at the time the instant suit was filed, these Petitioners were able to demonstrate that the State Court remedy, while it may have been plain and speedy, was not efficient in their case. Although the statute in question is baldly and patently unconstitutional, they could get no relief therefrom through state agencies and courts.

In this case, jurisdiction in the Federal Court is not concurrent with that in the State Court; it is consecutive. It depends upon the Petitioners showing that there is no plain, speedy and efficient remedy in the State courts. This they have done to a point of demonstration.

This case and the construction of the Tax Injunction Act and its impact on the Abstention Doctrine can be analogized to Title 28 USC, §2254. Under that statute, a Petitioner seeking Federal Habeas Corpus is faced with precisely the same type of jurisdictional sequence. There, he must exhaust his state remedies before coming to the Federal Court.

In the instant case, Petitioners respectfully suggest that where Petitioners are left high and dry after exhausting their state remedies, they cannot be precluded by the application of a judge made Abstention Doctrine from gaining the federal relief to which they are entitled.

II

CAN THE DOCTRINE OF RES JUDICATA BE APPLIED TO A SUIT WHERE THE PARTIES IN THE SUIT ON THE BASIS OF WHICH RES JUDICATA IS ASSERTED ARE NOT IDENTICAL TO THE PARTIES IN THE SUIT AT BAR?

In the first place, *res judicata* is an affirmative defense; it is not a bar to jurisdiction. In the second place, in the case at bar, the doctrine of *res judicata* cannot apply since the parties Petitioner in this suit are Mr. Boston Distiller Corp. and Consolidated Distributors of Tampa, Inc., whereas the parties Plaintiff in the Florida suit were Mr. Boston Distiller Corp. and Hartley and Parker, Inc. The precise question of whether *res judicata* can exist in this case was discussed by the Fifth Circuit in its own case of *Elliott Advertising Co. vs. Metropolitan Dade*

County, 425 F.2 1141 (5th Cir. 1970) where that court refutes its own argument in this case in terms which this Petitioner cannot improve upon and which we therefore quote:

> "Under the doctrine of res judicata, a prior judgment on the merits rendered by a state court of competent jurisdiction operates as a bar to a subsequent adjudication of the same cause of action, in substance rather than form, between the same parties or their privies in federal court, not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action, regardless of whether questions of federal or state law are involved. Acree v. Air Line Pilots Association, 5 Cir. 1968, 390 F.2d 199, cert. den. 393 U.S. 852, 89 S. Ct. 88, 21 L. Ed. 2d 122; Hudson v. Lewis, 5 Cir. 1951, 188 F.2d 679; Iselin v. C. W. Hunter Co. 5 Cir. 1949, 173 F. 2d 388; Jarrad v. Southeastern Shipbuilding Corporation, 5 Cir. 1947, 163 F. 2d 960; Thompson v. Houston Oil Co., 5 Cir. 1930, 37 F. 2d 687, 28 USC. §1738 (1948). However, it is equally elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969); Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940).

Two of the named plaintiffs-appellants in the instant action, Outdoor Media, Inc., and Webster Outdoor Advertising, were in no way involved in the previous actions brought by Donnelly and Elliot to challenge Ordinance No. 63-26, either as named parties or as members of a class being represented, and therefore are not bound by these previous adjudications. Nor are any unnamed members of the class represented in this action (with possible minor exception), which includes all persons who are in the outdoor advertising business or who own or lease outdoor advertising facilities in Dade County, Florida, bound by the prior state actions.

Nor does this Court lack jurisdiction to decide the substantive issues presented by this appeal under the rule that a federal district court has no jurisdiction to directly review a final determination of federal constitutional questions, voluntarily submitted to and decided by state courts in state court litigation. Rooker v. Fidelity Trust Company, 263 U.S. 413, S.Ct. 149, 68 L. Ed. 362 (1923); Paul v. Dade County, Fla. 5 Cir. 1969, 419 F. 2d 10; Brown v. Chastain, 5 Cir. 1969, 416 F. 2d 1012; Dade County Classroom Teachers' Ass'n v. Nathan, 5 Cir. 1969, 413 F. 2d 1005; Hanna v. Home Insurance Company, 5 Cir. 1960, 281 F. 2d 298, cert. den. 365 U.S. 838, 81 S. Ct. 751, 5 L. Ed. 2d 747; Williams v. Tooke, 5 Cir. 1940, 108 F. 2d 758. Each of these cases, with the possible exception of Paul v. Dade County, supra, expressly involved an effort to have a federal district court act as an

appellate court and review or set aside a final state court judgment. Clearly that is not the situation here. What is sought here is a de novo adjudication of the constitutionality of a county ordinance which had been challenged by some, but not all, of the plaintiffs and upheld in prior state litigation. Merely because a federal district court is called to pass upon federal constitutional issues which have previously been passed upon by a state court does not mean that the federal district court is assuming appellate jurisdiction to review a prior state judgment, even where some of the plaintiffs before it were also parties in the prior state action and may be barred under the doctrine of res judicata. The parties in this action who are unaffected by the prior state decisions are entitled to a determination of their constitutional rights under the ordinance, and it is their option whether to invoke the jurisdiction of the federal courts or the state courts. The statement of this Court in Paul v. Dade County, supra, that "[a] federal district court is without jurisdiction to hear federal constitutional claims already litigated in state courts when, as here, there is already a final appealable judgment by a state court at the time the federal suit is instituted" must be read in the light of Rooker, supra, and the other cases it relied on.

Without determining the full extent to which Elliott and Donnelly are barred by their involvement in the prior state actions under the doctrine of res judicata and collateral estoppel, we hold that the remaining plaintiffs-appellants and the

class they represent are in no way barred from prosecuting this action and proceed to consider the substantive issues raised by this appeal."

Clearly, there could be no *res judicata* argument here, even if *res judicata* could apply to bar the assertion of these federal rights which we do not, for a moment, concede.

III

CAN A SINGLE JUDGE OF A UNITED STATES DISTRICT COURT REFUSE TO REQUEST THE CONVENTION OF A THREE JUDGE DISTRICT COURT WHERE THERE IS NO QUESTION BUT THAT THE ALLEGATIONS OF THE COMPLAINT RAISE A SUBSTANTIAL QUESTION OF CONSTITUTIONALITY?

Petitioners, in their Complaint, asked the District Judge to take the necessary steps to convene a three judge court to hear the case. In *ex parte Poresky*, 290 U.S. 30, 54 S. Ct. 3, 78 L. Ed. 152 (1933), this Court held that if the allegations of the Complaint raise a substantial question of constitutionality, then the District Judge must take the proper steps to convene a three judge court.

A reading of the lower court's Order of Dismissal and of the Opinion of the Court of Appeals indicate that the one aspect of the case not passed upon is the question of the substantiality of Petitioners constitutional attack. It is easy to understand this upon a reading of the Complaint. The questions raised are certainly substantial.

Petitioners earnestly contend that they are entitled to have a three judge court consider this matter and make such determination of the case as they will and that any aggrieved party is then entitled to take a direct appeal to this Court from that determination. That is what the law provides and that is what the Parties are entitled to.

CONCLUSION

It is clear that the Abstention Doctrine cannot bar Petitioners suit in this case. That judge made rule cannot be applied to a situation where jurisdiction in the Federal Court was non-existent at the time that Petitioners went to the State Court.

It is equally clear that Petitioners have demonstrated that they have no efficient remedy in the state system.

It is abundantly clear that res judicata cannot apply to bar this suit, and in any event, res judicata cannot be a jurisdictional issue in this cause.

It is also clear that the single judge District Court could not and should not have made the determination to dismiss this cause.

Congress meant to give the District Courts original jurisdiction of cases arising under the Constitution of the United States, and they also meant to have those cases determined by three judge Federal Courts.

For the convenience of the states and the administration of state taxation, Congress provided in the Tax Injunction Act that where a plain, speedy and efficient

remedy could be had in the state courts, the District Courts were not to interfere with schemes of state taxation. In the instant case, there is not only no efficient remedy in the state courts available to Petitioner, but a reading of the Complaint and the Florida Supreme Court Opinion will demonstrate beyond question that the Supreme Court of Florida simply ignored the contents of the Florida Taxing Statute, and the requirements of constitutional due process in reaching their conclusion.

Petitioners respectfully suggest that the issues raised in this case, affecting as they do the totality of claims of federal constitutional protection in state tax matters, should be heard and determined by this Court; and they respectfully point out that if this case is, in fact, heard by this Court, this will be the first Court in the federal system which has deigned to hear oral argument on this case of first impression.

A writ should be granted.

Respectfully submitted,

GEORGE L. ONETT
and
SHALLE STEPHEN FINE
Attorneys for Petitioners
1237 City National Bank Building
Miami, Florida 33130

By: _____
SHALLE STEPHEN FINE

CERTIFICATE OF SERVICE

I certify that a copy of this Petition for Certiorari was air mailed to Herbert Klein, Esq., attorney for the Respondents, Department of Business Regulation, The Carlton Building, Tallahassee, Florida, this day of March, 1973.

SHALLE STEPHEN FINE

APPENDIX A

(Style and Number Omitted) (Filed May 22, 1972)

ORDER OF DISMISSAL FOR WANT OF JURISDICTION

This cause is before this Court upon plaintiffs' complaint for declaratory and injunctive relief wherein restraint in the enforcement of Florida Statutes, 1970, Section 561.463, is sought. Plaintiffs have requested that pursuant to Title 28, United States Code, Section 2284, a Three-Judge Court be convened to hear this matter as required by Title 28, United States Code, Section 2281. The statute assailed is a tax statute allotting a preferred rate of tax to distillers and bottlers of distilled products with respect to alcoholic beverages manufactured in Florida exclusively from raw materials produced in Florida and not blended with whiskey produced in any other state. It is alleged that this statutory scheme fixing qualifications for the preferred tax rate consists of an unreasonable classification and deprives plaintiffs of equal protection under the law and of due process of law. Before acting on plaintiffs' request the Court, sua sponte, raised the question of this Court's jurisdiction over the subject matter of this controversy and requested submission of briefs by plaintiffs.

Guided by Jackson v. Choate, 404 F.2d 910 (5th Cir. 1968), this Court reaches the threshold issue in this cause. The question presented is whether a Three-Judge Court should be empanelled to hear this matter because substantial constitutional questions may have been raised by the complaint.

To this recurring question, the answer to which it has been described can be arrived at only "by judicial prescience of a Delphic order", the Fifth Circuit Court of Appeals has supplied the following formula:

> "The substantive test is simple in terms, though not so simple in application—unless the claim of validity/invalidity is insubstantial a 3-Judge Court is required." Mayhue's Super Liquor Store, Inc. v. Meiklejohn, 426 F.2d 142, 144 (5th Cir. 1970).

The source for this pronouncement is found in the abysmal confines of Ex Parte Poresky, 290 U.S. 30 (1934):

> "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. * * * The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" Ibid. at 32.

Having considered the above principles in light of the allegations of the complaint, this Court, sitting as a single-Judge Court, concludes that the constitutional questions sought to be raised cannot be the subject of controversy in this Court and that a Three-Judge Court is not required to hear this cause. Ex Parte Poresky, supra. The basis for this decision is set forth in Paul v. Dade County, Florida, 419 F.2d 1012 (5th Cir. 1969).

The procedural meanderings of this cause may be capsulated thusly: plaintiff, Mr. Boston, filed a complaint for declaratory relief in the Circuit Court in and for Leon County, Florida, alleging that Florida Statutes, 1970, Section 561.463, as applied was comprised of an unreasonable classification and as such unconstitutionally discriminated against plaintiff, Mr. Boston. The Circuit Court accepted plaintiff's constitutional challenge to the statute as meritorious and declared the statute unconstitutional. A direct appeal to the Florida Supreme Court as provided by Fla. Const. Art. V., Section 4(2), ensued wherein the Supreme Court reversed the lower court and upheld the constitutionality of Florida Statutes, 1970, Section 561.463. See Faircloth et al v. Mr. Boston Distiller Corp. et al, ____ So.2d ____ (Fla. 1970). Following the decision by the Florida Supreme Court, plaintiffs did not seek to pursue the obvious avenue of appellate review. It is uncontroverted that the federal constitutional questions raised and adjudicated in the Florida courts are identical to those constitutional questions raised in the instant complaint for declaratory and injunctive relief.

In light of this Court's decision in Davis v. Adams, 315 F. Supp. 1293 (N.E. Fla. 1970) (Three-Judge Court), this Court, sua sponte, raised the question of subject matter jurisdiction and requested submission of briefs as to this threshold issue. Plaintiffs assert that jurisdiction of this Court is predicated on special federal question jurisdiction and is invoked pursuant to Title 28, United States Code, Section 1341. It is further contended that relief can be obtained in this Court as "exhaustion of state remedies" has occurred as contemplated by the foregoing section.

Insofar as plaintiffs interpret Title 28, United States Code, Section 1341 as requiring exhaustion before assumption of jurisdiction of the matter by this Court, the Court is in agreement with plaintiffs' interpretation. See e.g. American Commuters Assc. v. Levitt, 405 F.2d 1148 (2d Cir. 1969). The principle of comity no doubt was a paramount consideration of the Congress when this law was enacted just as it is under Title 28, United States Code, Section 2254(b), the habeas corpus statutory section requiring exhaustion.

Plaintiffs assume, however, that once exhaustion of remedies has been wrought in the state courts, the United States District Court must then take jurisdiction over the subject matter of the controversy and proceed to adjudicate the merits of plaintiffs' constitutional claims. This position is simply erroneous and draws no force by likening the exhaustion requirement of Title 28, United States Code, Section 1341 to that of the habeas corpus section.[1]

As was noted previously the same federal constitutional questions raised in the instant complaint have been argued to and heard by the highest tribunal of the State of Florida. What plaintiffs seek to have this Court do is to convene a Three-Judge Court to exercise appellate review of a decision of the Florida Supreme Court. This the Court cannot do. Paul v. Dade County, supra; Davis v. Adams, supra. See also Autokefalos Orthodox Spiritual Church of St. George, The Tropeophoros v. Hallahan, 103 F. Supp. 389 (S.D. N.Y. 1952).

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[1]This conclusion becomes plain when considered in light of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 417 n. 8 (1964).

Referring to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), this Court observes the following "judge made rule":

> "* * * We now explicitly hold that if a party freely and without reservation submit his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court." Ibid. at 419.

In accord, see NAACP v. Button, 371 U.S. 415 (1963).

In the proceedings below, plaintiffs fully litigated their federal constitutional claims and exposed them to the state tribunals for adjudication without expressly reserving, should the state courts hold against them on the question of state law, the right to return to the District Court for disposition of their federal contentions. See England, supra, at 421. Thus, it affirmatively appears that plaintiffs, in submitting their constitutional claims to the state courts, did so unreservedly with the express desire to have all claims there fully litigated. In such a procedural setting this cause should not be allowed to be relitigated in the United States District Court for obvious reasons:

> "* * * Such a rule would not only countenance an unnecessary increase in the length and cost of litigation; it would also be a potential source of friction between the state and federal judiciaries." England, supra, at 419.

Thus, having determined that this Court lacks jurisdiction over the subject matter of this controversy in its present procedural posture, it is appropriate for this Court, sitting as a single-Judge District Court, to dismiss the petition to convene a Three-Judge Court and to dismiss the complaint for want of jurisdiction. American Commuters Assc. v. Levitt, supra; Green v. Board of Elections of the City of New York, 380 F.2d 445 (2d Cir. 1967), cert. den. 389 U.S. 1048 (1968).

Accordingly, it is

ORDERED that petition for convening of a Three-Judge District Court pursuant to Title 28, United States Code, Section 2284, be and the same is hereby denied and the complaint be and the same is dismissed for want of jurisdiction.

DONE AND ORDERED at Tallahassee, Florida, this 22nd day of May, 1972.

/s/ DAVID L. MIDDLEBROOKS

UNITED STATES
DISTRICT JUDGE

* * *

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2350
Summary Calendar*

MR. BOSTON DISTILLER CORP. and
CONSOLIDATED DISTRIBUTORS OF TAMPA, INC.,
Plaintiffs-Appellants,

versus

RICHARD A. PALLOT, ET AL, Etc.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(November 1, 1972)

Before GEWIN, AINSWORTH and SIMPSON,
Circuit Judges.

PER CURIAM: Mr. Boston Distiller Corporation has attempted through various efforts to have a Florida tax statute declared unconstitutional. Pertinent to its attempts is the Tax Injunction Act, 28 U.S.C. §1341

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, 5 Cir., 1970, 431 F.2d 409, Part I.

(1964), which provides that the federal district courts shall not interfere with state taxes where an efficient remedy is available in state courts. After unreservedly presenting its case to the Florida courts, and losing (finally before the Florida Supreme Court[1]), the corporation now resorts to the federal courts by this suit. At issue is whether the Tax Injunction Act, by confining appellant's initial choice of forum to the state courts, provides an exception to the doctrine of res judicata for a subsequent suit in federal court. Under the circumstances here we believe res judicata applies and prevents further consideration by us. Accordingly, the District Judge properly dismissed the case. Autokefalos Orthodox Spiritual Church of Saint George, The Tropeophoros, v. Hallahan, S.D.N.Y. 1952, 103 F.Supp. 389; 1 A Moore's Federal Practice ¶0.207 (1965).

AFFIRMED.

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[1]Faircloth v. Mr. Boston Distiller Corp., Fla. 1970, 245 So. 2d 240.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2350

MR. BOSTON DISTILLER CORP. and
CONSOLIDATED DISTRIBUTORS OF TAMPA, INC.,
Plaintiffs-Appellants,

versus

RICHARD A. PALLOT, ET AL, Etc.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion Nov. 1, 1972, 5 Cir., 1972, ____ F.2d ____).

(December 19, 1972)

Before GEWIN, AINSWORTH and SIMPSON,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court

be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED. See E. B. Elliott Adv. Co. v. Metropolitan Dade County, 5th Cir., 1970, 425 F.2d 1141, 1148, 1149, n.3; Battle v. Cherry, 339 F. Supp. 186, 191-93 (N.D. Ga. 1972).

APPENDIX D

COMPLAINT

The Plaintiffs, MR. BOSTON DISTILLER CORP., a Florida corporation, and CONSOLIDATED DISTRIBUTORS OF TAMPA, INC., a Florida corporation, sue RICHARD A. PALLOT, JACK D. DEMETREE, NELSON A. ITALIANO, B. W. SIMPKINS and J. H. BAROCO, as members of and constituting the BOARD OF BUSINESS REGULATION of the State of Florida, and as and for their Complaint allege:

JURISDICTION

(1) This is an action for declaratory, injunctive and other relief against a state tax. Jurisdiction lies in this Court under the provisions of Title 28 U.S.C. Section 1331(a):

> "The District Court shall have exclusive jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution laws, or treaties of the United States."

This case arises under the Constitution.

(2) Plaintiff has no plain, speedy and efficient remedy in the Courts of Florida and the provisions of Title 28 U.S.C. Section 1342 do not apply to this case. As will

subsequently appear, the Plaintiff, MR. BOSTON DISTILLER CORP., has been denied relief by the state court through and including the Supreme Court of Florida.

(3) Under the provisions of Title 28 U.S.C. Section 2281, a three Judge Court is required in this case and Plaintiff requests that such a Court be convened to hear this case pursuant to Title 28 U.S.C. Section 2284.

(4) Venue is properly laid in this Court under the provisions of Title 28, U.S.C., Section 1391(b). The official residence of the Defendants is in Tallahassee, Florida.

FACTS

(5) The Plaintiffs are corporations existing under the laws of the State of Florida, and have been such since their organization.

(6) The individual Defendants in their official capacity and the Defendant Board which they compose is charged with the enforcement of Florida law respecting alcoholic beverages and with the collection of the tax here in question under F.S. 20.16 and F.S. 562.17.

(7) The Plaintiff, MR. BOSTON DISTILLER CORP., (hereinafter called "Mr. Boston") was organized for the purpose of bottling spirituous liquors and has engaged in that business exclusively since September 24, 1968, under license from the State of Florida. MR. BOSTON's liquor has always been bottled exclusively in Florida and has always been manufactured exclusively in Florida from raw materials grown and produced in Florida. Since October 31, 1969, the entire outstanding capital

stock of Plaintiff has been owned by Glenmore Distilleries Company, a Delaware corporation, operating a distilling business. Plaintiff, CONSOLIDATED DISTRIBUTORS OF TAMPA, INC., (hereinafter called "Consolidated") is and has been at all times material to this Complaint, a distributor of spirituous liquors licensed by the State of Florida.

(8) The State of Florida has regulated the manufacture, bottling and sale of alcoholic beverages by statute. Florida Statutes, Title XXXII, Ch. 561.569. Among the statutes so enacted are statutes imposing excise taxes on liquor as follows:

> "F.S. 561.46(5): As to beverages containing fourteen per cent or more of alcohol by weight and not more than forty-eight per cent of alcohol by weight, except wines, there shall be paid by all manufacturers, distributors and vendors a tax at the rate of two dollars and seventy-six cents per gallon. The additional tax due to vendors shall be payable on or before July 31, 1968.
>
> "(b) As to all such beverages manufactured and bottled in Florida from Florida-grown citrus products, citrus by-products, honey, fresh fruits, berries, grapes, sugar cane, guavas, potatoes, peaches, papayas, strawberries and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state the tax imposed by paragraph (a) hereof shall not apply; provided, however, that in lieu thereof there shall be paid by all manufacturers and distributors a tax at the rate of fifty-six cents per gallon."

"F.S. 561.461: (1) In addition to all taxes now levied and imposed by the laws of this state upon the manufacture, distribution and sale of beverages containing fourteen per cent or more of alcohol by weight, except all wines, natural sparkling wines and malt beverages, there is hereby levied and imposed an additional tax of twenty-seven cents per gallon upon such beverages containing fourteen per cent or more of alcohol by weight and an additional tax of fifty-four cents per gallon upon such beverages containing more than forty-eight per cent of alcohol by weight. The funds derived from the tax herein levied and imposed shall be deposited in the general revenue fund.

"(2) As to beverages manufactured and bottled in this state from Florida-grown citrus products, citrus by-products, honey, fresh fruits, berries, grapes, sugar cane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the additional tax imposed by subsection (1) of this section shall not apply; provided, that in addition to all taxes now levied and imposed by the laws of Florida upon such beverages there is hereby levied and imposed an additional tax of ten cents per gallon upon such beverages containing fourteen per cent or more of alcohol by weight and not more than forty-eight per cent of alcohol by weight and an additional tax of twenty cents per gallon upon such beverages containing more than forty-eight per cent of alcohol by weight."

"F.S. 561.64: (1) In addition to all taxes now levied and imposed by the laws of Florida upon the manufacture, distribution, and sale of beverages containing fourteen per cent or more of alcohol by weight, except all wines, natural sparkling wines and malt beverages, there is hereby levied and imposed an additional tax of seventy-two cents per gallon upon such beverages containing fourteen per cent or more of alcohol by weight and not more than forty-eight per cent of alcohol by weight and an additional tax of one dollar and fourty-four cents per gallon upon such beverages containing more than forty-eight per cent of alcohol by weight.

"(2) As to beverages manufactured and bottled in this state from Florida-grown citrus products, citrus by-products, honey, fresh fruits, berries, sugar cane, grapes, guavas, potatoes, peaches, papayas, strawberries and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the additional tax imposed by subsection (1) shall not apply; provided, however, that in addition to all taxes not levied and imposed by the laws of this state upon such beverages there is hereby levied and imposed an additional tax of twenty-eight and eight tenths cents per gallon upon such beverages containing fourteen per cent or more of alcohol by weight and an additional tax of fifty-seven and six tenths cents per gallon upon such beverages containing more than forty-eight per cent of alcohol by weight." [effective October 1, 1970, Ch. 70-255 Laws of Florida 1970 Section 4-ed.]

The effect of these statutes is to encourage the manufacture and bottling in Florida of spirits from Florida grown materials by granting a tax advantage therefor. This advantage is summarized as follows as it applies after October 1, 1970 to MR. BOSTON's product which is between 14% and 48% alcohol by weight:

	Florida Rate-Tax Per Gallon	Non-Florida Rate-Tax Per Gallon
F.S. 561.46(5)	.56 cents	$2.76
F.S. 561.461	.10	.27
F.S. 561.64	.288	.72
TOTAL	$.948	$3.75

(Prior to October 1, 1970, when amendments to the statutes became effective an even larger tax break was given qualifying products:

	Florida Rate Per Gallon	Non-Florida Rate Per Gallon
F.S. 561.46(5)	.28 cents	$2.76
F.S. 561.461	.05	.27
F.S. 561.64	.144	.72
TOTAL	$.474	$3.75)

(9) The difference in state excise tax per gallon on MR. BOSTON's products is thus $2.802 per gallon after October 1, 1970, and was $3.276 per gallon before that.

(10) The statutory plan above described has been in effect for many years, although the amounts of tax payable per gallon have been increased from time to time.

(11) Plaintiff, MR. BOSTON, has bottled qualifying liquor since it began operations in 1968. It was accorded the preferred tax treatment by the state from the inception of its operation until October 1, 1970. It therefore got the preferred tax treatment both before and after the acquisition of its stock by Glenmore Distilleries Company.

(12) On October 1, 1970, Florida Statute, Sec. 561.463 became effective, having been newly enacted. The statute provides:

> "(1) In order to qualify, in whole or in part, for the Florida tax rate provided in Section 561.46(5)(b), (6)(b), 561.461(2) and 561.64 (2), an alcoholic beverage must be manufactured, exclusively from raw materials, except for flavoring extracts, produced in Florida and may not be blended with whiskey produced in any other state. Such beverage must be either distilled and bottled by a distiller licensed under Section 561.35(1) (d) and (f) who conducts distilling operations only in Florida and in no other state, or bottled by a bottler licensed under Section 561.35(1)(e) who conducts bottling operations only in Florida and in no other state. Such beverages shall bear a Florida sunburst emblem no smaller than one half inch in diameter reading "Made in Florida."

"(2) If a Florida distiller is an individual or copartnership such individual or copartnership shall be deemed to be conducting distilling operations in a state other than Florida if the individual or any member of the copartnership is interested or connected, directly or indirectly, or if such distiller produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any corporation which is engaged directly, indirectly, or through any subsidiary or affiliate corporation, including any stock ownership as set forth in subsection (3), in distilling spirituous liquors in any state other than the state of Florida.

"(3) If a Florida distiller shall be a corporation, such corporation shall be deemed to be engaged in distilling operations in a state other than Florida when such corporation is affiliated with, directly or indirectly, or is affiliated with, directly or indirectly, or if such distiller produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any other corporation, which is engaged in distilling spirituous liquors in any state other than Florida, or when such corporation is controlled by, or the majority of stock therein is owned by another corporation which latter corporation owns or controls in any way the majority of stocks controlling interest in any other corporation which is engaged, directly or indirectly, in distilling spirituous liquors in any state other than Florida.

"(4) If a Florida bottler is an individual or copartnership, such individual or copartnership shall be deemed to be conducting bottling operation in a state other than Florida in the event the individual or any member of the copartnership is interested or connected, directly or indirectly, or if such bottler produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any corporation which is engaged, directly or indirectly, or through any subsidiary or affiliate corporation including any stock ownership as set forth in subsection (5) in bottling spirituous liquors in any state other than Florida.

"(5) If a Florida bottler is a corporation, such corporation shall be deemed to be carrying on bottling operations in a state other than Florida when such corporation is affiliated with, directly or indirectly, or if such bottler produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any other corporation which is engaged in bottling spirituous liquors in any state other than Florida, or when such corporation is controlled by or the majority of stock therein is owned by another corporation, which latter corporation owns or controls in any way majority of stocks or controlling interest in any other corporation which is engaged directly or indirectly in bottling spirituous liquors in any state other than Florida."

(13) Plaintiff, MR. BOSTON, is in compliance with and is perfectly able to comply with subsection (1) of

F.S. 561.463 insofar as labeling is concerned. Plaintiff has been denied the Florida tax rate since October 1, 1970, under F.S. 561.463 above, because its stock is owned by Glenmore Distilleries and because another wholly owned subsidiary corporation of Glenmore organized in Massachusetts markets liquor under the name and label "Mr. Boston" as does Plaintiff.

(14) Since October 1, 1970, Plaintiff, MR. BOSTON, has been required to absorb over $250,000 in additional taxes resulting from the denial to it of the Florida tax break because of the provisions of F.S. 561.463 above. Plaintiff has absorbed the taxes by adjusting its prices to distributors to compensate for the tax load imposed on its products because of the provisions of F.S. 561.463. If it had not so adjusted its prices, it could not have marketed its liquor since there are two other entities in Florida marketing similar liquor who have the advantage of the Florida tax break.

(15) One of the two other entities marketing similar liquor, to-wit: the Jacquin Florida Distilling Company operates a distillery in Florida where it distills as well as bottles its products. In this it differs from Plaintiff, MR. BOSTON, which does not distill its own product but simply bottles it. Jacquin Florida Distilling Company operates and conducts a bottling operation in Philadelphia, Pennsylvania. The Pennsylvania product is sold under identical or virtually identical brand names and labels to the Jacquin Florida product. However, Jacquin is eligible for the Florida tax break under F.S. 561.463 since that statute provides in subsection 1 that the beverage to qualify must be:

> ". . . either distilled and bottled by a distiller licensed under section 561.35(1)(d) and (f), who

conducts distilling operations only in the State of Florida and in no other state, or bottled by a bottler licensed under section 561.35(1)(e) who conducts bottling operations in the State of Florida and in no other state."

The statute further provides in subsection (3):

"If a Florida distiller shall be a corporation such corporation shall be deemed to be engaged in distilling operations in a state other than Florida when such corporation is affiliated with, directly or indirectly, or if such distiller produces an alcoholic beverage under a brand name identical or deceptively similar to the brand name of any other corporation, which is engaged in the distilling of spirituous liquors in any state other than Florida . . ." [Emphasis added.]

(16) Thus, the statute is tailor made to permit Jacquin to continue to operate with the benefit of the Florida tax break although it is engaged in operations which are prohibited to Plaintiff, MR. BOSTON, as a bottler. Jacquin distills in Florida and bottles in Florida and another state so it gets the tax break. Plaintiff, MR. BOSTON, bottles in Florida and in no other state and does not distill at all but is denied the tax break under the statute because its stock is owned by Glenmore which, through another subsidiary, markets MR. BOSTON liquors produced in Massachusetts.

(17) A reading of F.S. 561.463, subsections 2, 3, 4 and 5 demonstrates:

(a) Under subsection 2, if a Florida distiller is an individual or copartnership, it cannot get the Florida tax break if it is interested in or connected directly or indirectly with a corporation distilling in a state other than Florida. There is no prohibition in the statute against a distiller having such connection with an individual or copartnership or other business entity other than a corporation distilling in a state other than Florida and still receiving the Florida tax advantage.

(b) Under subsection 3, if a Florida distiller is a corporation, it cannot get the Florida tax advantage if it is affiliated with directly or indirectly another corporation distilling outside the state of Florida; however, there is no prohibition against affiliation with an individual, copartnership or other business entity other than a corporation distilling outside the state of Florida.

(c) In both subsections 2 and 3, there is no prohibition against a distiller conducting a bottling operation in Florida and anywhere else either directly or in affiliation with any person, firm or business entity and receiving the tax advantage.

(d) Under subsection 4, a Florida bottler is prohibited from getting the Florida tax break if it is affiliated with a corporation bottling in another state. It can get the Florida tax break if it is affiliated with any entity distilling in another state or if it is affiliated with a bottler in another state which is an individual, copartnership or any other entity other than a corporation.

(e) Under subsection 5 of the statute, if a Florida bottler is a corporation, it cannot get the tax break if

it is affiliated with a corporation bottling liquor in any other state but it does get the tax break if it is affiliated with an individual, copartnership or any other entity other than a corporation bottling anywhere; in like manner it can be affiliated with a distiller no matter what the entity of the distiller and no matter where its location so long as the distiller does not bottle.

(18) The liquor business is the most rigidly controlled business operation in the United States today. Every distiller and every bottler in the United States is licensed by the United States Government and by the state where it conducts its operation. Every drop of liquor is accounted for to both the Federal and State Government. Every fifth of liquor shipped from one state to another, and all bulk shipments are accounted for both to the Federal Government, the state of shipment and the receiving state. When raw materials, such as grain, are produced by a distiller for manufacture into liquor, the purchase and the amount thereof is reported to the Federal Government and the state. The net result of this process of regulation and taxation is that every distiller, rectifier, blender and bottler of liquor accounts at every stage of the process for all of the liquor to both Federal and state authorities. It is impossible to send a fifth of liquor into Florida from another state or out of Florida to another state without filing a report respecting that bottle both with Florida, the Federal Government and the state of receipt. The State of Florida has in its hands, or available to it at all times, reports allowing it to trace every bottle of liquor in the state back to its original source and by original source is meant the purchase by the distiller of the grain or other raw material from which the liquor is manufactured.

(19) The Plaintiff, CONSOLIDATED, is a licensed distributor of liquors in the State of Florida. Under Florida Statute, it pays to the Defendant Board the taxes on liquor above referred to as it distributes the liquor. It has purchased a large amount of liquor from the Plaintiff, MR. BOSTON. From November 1, 1970, through June 30, 1971; CONSOLIDATED distributed 14,537 and four-tenths gallons of Florida products under 48% alcohol by weight purchased from MR. BOSTON, and the difference in tax paid to the Defendant Board by Plaintiff, CONSOLIDATED, between the Florida tax rate and the non-Florida tax rate on these distributions for that period was $40,704.20. While the tax monies were transmitted and paid by Plaintiff, CONSOLIDATED, Plaintiff, CONSOLIDATED, received an adjustment from Plaintiff, MR. BOSTON, in that amount to compensate it for the taxes so that it would continue to distribute MR. BOSTON's products and not switch over to a competitor's product gaining the benefit of the Florida tax rate.

(20) Plaintiff, MR. BOSTON, has since October 1, 1970, absorbed over $250,000 in taxes resulting from the denial to it of the Florida tax rate and has been forced to stop bottling operations since it is not able to compete in this market because of the statute. It is ready, willing and able to commence bottling operations if it gets the Florida tax rate to which it is entitled.

(21) Plaintiff, MR. BOSTON, has previously filed its Complaint in the Second Judicial Circuit in and for Leon County, Florida, seeking relief from the unlawful and unconstitutional discrimination imposed against it by F.S. 561.463. The Circuit Court declared the statute unconstitutional as applied to Plaintiff, MR. BOSTON. A copy

of that Judgment is attached hereto as Exhibit 1. On appeal, the Circuit Court was reversed by the Supreme Court of Florida. A copy of that Opinion is attached hereto as Exhibit 2. That Opinion upholds the constitutionality of F.S. 561.463. That Opinion has become final and no relief against the statute and the collection of this tax is available to Plaintiffs in the state.

(22) The statutory scheme for qualification for the Florida tax break imposed by F.S. 561.463 is unconstitutional as applied to these Plaintiffs because it is arbitrary, discriminatory, rests on no reasonable classification and denies to the Plaintiff the equal protection of the law and the due process of law under the United States Constitution. The statute prohibits Plaintiff, MR. BOSTON, from receiving the Florida tax break for its product because its stock is owned by Glenmore Distilleries Companies and because Glenmore markets products through another subsidiary which bear similar labels. If Glenmore were a copartnership instead of a corporation, Plaintiff, MR. BOSTON, would receive the Florida tax break and this is so irrespective of its labels. Plaintiff, MR. BOSTON, is a Florida corporation. If its stock were owned by a corporation which was a distiller in another state, but not a bottler, it would qualify for the Florida tax break and this is also irrespective of its labels. There is and can be no reasonable justification for these distinctions in fact or in law, nor is there any reasonable basis in this statute for denying to this Florida corporation the Florida tax advantage.

WHEREFORE, Plaintiff prays that this Court will:

(1) Take jurisdiction of this cause and of the parties hereto; and

(2) Convene a three Judge Court to hear this cause; and

(3) After hearing, declare that F.S. 561.463 is unconstitutional as applied to the Plaintiff insofar as it denies to the Plaintiff, MR. BOSTON, the Florida tax advantage on its Florida products qualifying otherwise; and

(4) Enjoin and restrain the Defendants, their successors in office and their successor agencies of the state from collecting the difference between the Florida product tax rate and the non-Florida product tax rate on Plaintiff, MR. BOSTON's, Florida products qualifying therefor except for F.S. 561.463; and

(5) Grant to the Plaintiff such other further and general relief as may be meet and proper in the circumstances.

By GEORGE L. ONETT

Of Counsel

By SHALLE STEPHEN FINE

Of Counsel

EXHIBIT 1

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 70-833

MR. BOSTON DISTILLER CORP. and HARTLEY & PARKER, INC.,

Plaintiffs,

v.

ROGER P. DOYLE, C. C. HARRISON, JR., EUGENE TOLL, CHARLES REX, JR. and THOMAS B. WOOD, as and constituting THE BOARD OF BUSINESS REGULATION, STATE OF FLORIDA DEPARTMENT OF BUSINESS REGULATION, an agency of the State of Florida,

Defendants.

OLD FLORIDA RUM COMPANY, a corporation, and JACQUIN-FLORIDA DISTILLERY COMPANY, a corporation,

Intervenors.

SUMMARY JUDGMENT

On motion for summary judgment the real issues between the parties turn upon the constitutional validity of certain portions of Chapter 70-225, Laws of Florida, as it applies to the rate of excise tax required of the plaintiffs with respect to alcoholic beverages manufactured in

Florida exclusively from raw materials produced in Florida (except for flavoring extracts) and not blended with whiskey produced in any other state.

Plaintiff, Mr. Boston Distillers Corporation, a Florida corporation, is a bottler of alcoholic beverages, as above described, but, its name the contrary notwithstanding, it does not distill any such beverages. It bottles such beverages, but only in Florida. A majority of its capital stock is owned by another corporation, Glenmore Distillers Company, which owns distilleries in another state. Glenmore also owns a controlling interest in two other corporations which bottle spirituous liquors in the States of Massachusetts and Georgia. Mr. Boston itself does no distilling and does no bottling except in Florida. Some of its products manufactured in Florida are, with the consent of Glenmore Distilleries Company, sold under a brand name identical to one used by Glenmore or Glenmore subsidiaries in marketing similar products in other states.

The facts of the case are not in serious controversy and the Court's decision must turn on questions of law which have been argued by the original parties and the intervenors. It is

ORDERED, ADJUDGED and DECLARED:

1. So much of Chapter 70-225 as provides that for alcoholic beverages to qualify for the reduced tax rate provided in Sections 561.46(5)(b), (6)(b), Section 561.461(2) and Section 561.64(2)

> ". . . such beverage must be either distilled and bottled by a distiller licensed under Section

> 561.35(1)(d) and (f), who conducts distilling operations only in the State of Florida and in no other state, or bottled by a bottler licensed under Section 561.35(1)(e) who conducts bottling operations only in the State of Florida and in no other state. . ."

is void and inoperative because in violation of the equal protection clause of Section 2, Article I, of the Constitution of Florida in that it makes an unreasonable classification of persons for the purpose of taxation. Allowing the benefit of the reduced tax upon Florida products to one of two companies who bottle alcoholic beverages in Florida and denying such lower tax rate to the other merely because the first distills some such beverages in Florida (and does not distill in another state) is without any reasonable relationship to the classification of persons for the purpose of taxation. All liquors to be taxed at the lower rate must be distilled in Florida from Florida products. All must be bottled in Florida. Whether or not one bottler distills in Florida is wholly unrelated to the tax since there is no requirement that the spirits distilled in Florida be bottled in Florida or be the spirits with respect to which that manufacturer claims the lower tax rate.

2. So much of Chapter 70-225, Laws of Florida, as provides:

> "If a Florida bottler shall be a corporation, such corporation shall be deemed to be carrying on bottling operations in a state other than the state of Florida, when such corporation is affiliated

> with, directly or indirectly, or if such bottler produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any other corporation which is engaged in bottling spirituous liquors in any state other than the state of Florida, or when such corporation is controlled by or the majority of stock therein is owned by another corporation, which latter corporation owns or controls in any way the majority of stocks or controlling interest in any other corporation which is engaged directly or indirectly in bottling spirituous liquors in any state other than the state of Florida."

is void and inoperative, being included in the act of violation of Section 6, Article III of the Constitution of Florida in that there is nothing in the title to the act to put any reasonable person on notice that the act would attempt to change the ordinary meaning of the words "distilled" and "bottler" or that the act would attempt to make two classes of "distillers" and two classes of "bottlers" and apply the "limited rate of taxation" to one class of distillers and not the other, and to one class of bottlers and not the other. The title to the act is clearly misleading as to this portion of its contents.

3. So much of that portion of Chapter 70-225 quoted in the preceding paragraph as purports to deny to Mr. Boston the lower tax accorded other manufacturers merely because of the ownership of stock of Mr. Boston by Glenmore or use by Mr. Boston of a brand name also used by Glenmore is void and inoperative in that it denies Mr.

Boston the equal protection of the law in violation of Section 2, Article I of the Constitution of Florida.

The statute would deny its benefits to Mr. Boston who bottles beverages in Florida and give its benefits to a competitor who also bottles beverages in Florida merely because the competitor distills in Florida and stock of Mr. Boston is owned by a company which distills in another state, regardless of whether or not the distilling operations of the competitor in Florida use Florida raw materials or whether or not the beverages distilled by it in Florida are sold in Florida; and regardless of whether or not the distilling operations of the stockholders of Mr. Boston have any economic or legal relationship to the State of Florida. There is no reasonable relationship between the distilling operations and the taxable transactions.

When two legally identical products are manufactured and bottled in the same way and in strict compliance with law and are lawfully marketed under brand names any attempt to tax one product at a higher rate merely because it is marketed under a brand name that is also used in marketing in another state a legally identical product manufactured in another state is a denial of the equal protection of the law. There is nothing in the statute to suggest there is any reasonable relationship between the use of brand names and gross sales or net profits. Products bearing one brand name used only by one company manufacturing in one state may sell in large quantities in a large area. Another name franchised to two companies, operating in two states, may sell in smaller quantities in a smaller area. Two Florida companies operating

in Florida, manufacturing similar products from raw materials produced in Florida cannot be classified differently merely because the trade name used by one to identify its product may be the same as, or similar to, the trade name of a similar product manufactured and marketed in another and possibly distant state.

DONE and ORDERED at Tallahassee, Leon County, Florida, this 22nd day of July, A.D., 1970.

/s/ HUGH M. TAYLOR

Circuit Judge

EXHIBIT 2

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1970

Case No. 39,980

EARL FAIRCLOTH, as Attorney General, ROGER P. DOYLE, C. C. HARRISON, JR., EUGENE TOLL, CHARLES REX, JR., and THOMAS B. WOOD, as and constituting THE BOARD OF BUSINESS REGULATION, STATE OF FLORIDA DEPARTMENT OF BUSINESS REGULATION, ETC.; OLD FLORIDA RUM COMPANY, ETC. and JACQUIN-FLORIDA DISTILLING COMPANY, ETC.,

Appellants,

vs.

MR. BOSTON DISTILLER CORP. and HARTLEY & PARKER, INC.,

Appellees.

Case No. 40,119

OLD FLORIDA RUM COMPANY,

Appellant,

vs.

MR. BOSTON DISTILLER CORP., HARTLEY & PARKER, INC., RODGER P. DOYLE, C. C. HARRISON, JR., and THOMAS B. WOOD, as and constituting THE BOARD OF BUSINESS REGULATION, STATE OF FLORIDA DEPARTMENT OF

BUSINESS REGULATION, an agency of the State of Florida, and JACQUIN-FLORIDA DISTILLERY COMPANY, a corporation,

Appellees.

Opinion filed October 21, 1970

Appeals from the Circuit Court for Leon County, Hugh M. Taylor, Judge.

Wilbur E. Brewton, Jesse Warren, Earl Faircloth, Attorney General and T. T. Turnbull for Board of Business Regulation, State of Florida, Department of Business Regulation, etc.; L. Grant Peeples, L. Ralph Smith, Jr., and Edgar M. Moore of Peeples, Smith & Moore for Old Florida Rum Company; Julius F. Parker, Jr. of Parker, Foster and Madigan for Jacquin Florida Distilling Company, Inc., Appellants

Robert M. Ervin, Wilfred C. Varn and Joseph C. Jacobs of Ervin, Pennington, Varn & Jacobs, for Appellees.

ROBERTS, Acting Chief Justice.

These are direct appeals, pursuant to Fla. Const. Art. V., Section 4(2), from certain orders of the circuit court in and for Leon County and from a summary judgment entered by said court directly passing upon the validity of Chapter 70-225, Laws of Florida, which amended portions of Chapter 561, Florida Statutes. The Summary Judgment appears as follows:

> "On motion for summary judgment the real issues between the parties turn upon the constitu-

tional validity of certain portions of Chapter 70-225, Laws of Florida, as it applies to the rate of excise tax required of the plaintiffs with respect to alcoholic beverages manufactured in Florida exclusively from raw materials produced in Florida (except for flavoring extracts) and not blended with whiskey produced in any other state.

"Plaintiff, Mr. Boston Distillers Corporation, a Florida corporation, is a bottler of alcoholic beverages, as above described, but, its name to the contrary notwithstanding, it does not distill any such beverages. It bottles such beverages, but only in Florida. A majority of its capital stock is owned by another corporation, Glenmore Distillers Company, which owns distilleries in another state. Glenmore also owns a controlling interest in two other corporations which bottle spirituous liquors in the States of Massachusetts and Georgia. Mr. Boston itself does no distilling and does no bottling except in Florida. Some of its products manufactured in Florida are, with the consent of Glenmore Distilleries Company, sold under a brand name identical to one used by Glenmore or Glenmore subsidiaries in marketing similar products in other states.

"The facts of the case are not in serious controversy and the Court's decision must turn on questions of law which have been argued by the original parties and the intervenors. It is

"ORDERED, ADJUDGED and DECLARED:

"1. So much of Chapter 70-225 as provides that for alcoholic beverages to qualify for the reduced tax rate provided in Sections 561.46(5)(b), (6)(b), Section 561.461(2) and Section 561.64(2)

> '. . . such beverage must be either distilled and bottled by a distiller licensed under Section 561.35(1)(d) and (f), who conducts distilling operations only in the State of Florida and in no other state, or bottled by a bottler licensed under Section 561.35(1)(e) who conducts bottling operations only in the State of Florida and in no other state. . . "

is void and inoperative because in violation of the equal protection clause of Section 2, Article I of the Constitution of Florida in that it makes an unreasonable classification of persons for the purpose of taxation. Allowing the benefit of the reduced tax upon Florida products to one of two companies who bottle alcoholic beverages in Florida and denying such lower tax rate to the other merely because the first distills some such beverages in Florida (and does not distill in another state) is without any reasonable relationship to the classification of persons for the purpose of taxation. All liquors to be taxed at the lower rate must be distilled in Florida from Florida products. All must be bottled in Florida. Whether or not one bottler distills in Florida is wholly unrelated to the tax since there is no requirement that the spirits distilled in Florida be bottled in Florida or be the spirits with respect to which that manufacturer claims the lower tax rate.

"2. So much of Chapter 70-225, Laws of Florida, as provides:

> 'If a Florida bottler shall be a corporation, such corporation shall be deemed to be carrying on bottling operations in a state other than the state of Florida, when such corporation is affiliated with, directly or indirectly, or if such bottler produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any other corporation which is engaged in bottling spirituous liquors in any state other than the state of Florida, or when such corporation is controlled by or the majority of stock therein is owned by another corporation, which latter corporation owns or controls in any way the majority of stocks or controlling interest in any other corporation which is engaged directly or indirectly in bottling spirituous liquors in any state other than the state of Florida.'

is void and inoperative, being included in the act of violation of Section 6, Article III of the Constitution of Florida in that there is nothing in the title of the act to put any reasonable person on notice that the act would attempt to change the ordinary meaning of the words 'distiller' and 'bottler' or that the act would attempt to make two classes of 'distillers' and two classes of 'bottlers' and apply the 'limited rate of taxation' to one class of distillers and not the other, and to one class of bottlers and not the other. The title

to the act is clearly misleading as to this portion of its contents.

"3. So much of that portion of Chapter 70-225 quoted in the preceding paragraph as purports to deny to Mr. Boston the lower tax accorded other manufacturers merely because of the ownership of stock of Mr. Boston by Glenmore or use by Mr. Boston of a brand name also used by Glenmore is void and inoperative in that it denies Mr. Boston the equal protection of the law in violation of Section 2, Article I of the Constitution of Florida.

"The statute would deny its benefits to Mr. Boston who bottles beverages in Florida and give its benefits to a competitor who also bottles beverages in Florida merely because the competitor distills in Florida and stock of Mr. Boston is owned by a company which distills in another state, regardless of whether or not the distilling operations of the competitor in Florida use Florida raw materials or whether or not the beverages distilled by it in Florida are sold in Florida; and regardless of whether or not the distilling operations of the stockholders of Mr. Boston have any economic or legal relationship to the State of Florida. There is no reasonable relationship between the distilling operations and the taxable transactions.

"When two legally identical products are manufactured and bottled in the same way and in strict compliance with law and are lawfully

marketed under brand names any attempt to tax one product at a higher rate merely because it is marketed under a brand name that is also used in marketing in another state a legally identical product manufactured in another state is a denial of the equal protection of the law. There is nothing in the statute to suggest there is any reasonable relationship between the use of brand names and gross sales or net profits. Products bearing one brand name used only by one company manufacturing in one state may sell in large quantities in a large area. Another name franchised to two companies, operating in two states, may sell in smaller quantities in a smaller area. Two Florida companies operating in Florida, manufacturing similar products from raw materials produced in Florida cannot be classified differently merely because the trade name used by one to identify its product may be the same as, or similar to, the trade name of a similar product manufactured and marketed in another and possibly distant state.

"DONE and ORDERED at Tallahassee, Leon County Florida, this 22 day of July, A.D. 1970."

Appellants' arguments can be summarized as follows: (a) Chapter 70-225, Laws of Florida,[1] is a valid

[1]For clarity of presentation and future reference Section 1., Chapter 70-225, Laws of Florida, including the title, follows in full although this case is only directly concerned with subsections (1) and (5). "An Act relating to tax rate on Florida-grown products; amending Chapter 561, Florida Statutes, by adding a new section limiting the tax rate accorded beverages manufactured in Florida from Florida-grown products to such beverages manufactured exclusively from

and proper exercise of the Legislature's inherent power to tax and provide revenue for the state's operation; (b) the title of the bill, Senate Bill 1163, was sufficient to place complaining parties on notice as to the contents

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Florida-grown products, and not blended with out-of-state whiskey, and distilled and bottled by a distiller who conducts distilling operations only in the state of Florida and in no other state, or bottled by a bottler who conducts bottling operations only in the state of Florida and in no other state; and providing certain other limitations; amending Sections 561.46(5)(b) and (6)(b), 561.461(2) and 561.64(2), Florida Statutes, by increasing the tax rate on alcoholic beverages made from Florida-grown products; providing an effective date.

"Be It Enacted by the Legislature of the State of Florida:

"Section 1. Chapter 561, Florida Statutes, is amended by adding a new section to read:

"Limitations and qualifications on tax rate for Florida-grown products.—

"(1) In order to qualify, in whole or in part, for the Florida tax rate provided in section 561.46(5)(b), (6)(b), section 561.461(2) and section 561.64(2), an alcoholic beverage must be manufactured exclusively from raw materials produced in the state of Florida (except for flavoring extracts) and may not be blended with whiskey produced in any other state; provided, further, that such beverage must be either distilled and bottled by a distiller licensed under section 561.35(1)(d) and (f), who conducts distilling operations only in the state of Florida and in no other state, or bottled by a bottler licensed under section 561.35(1)(e) who conducts bottling operations only in the state of Florida and in no other state; provided further, that such beverages shall bear a Florida sunburst emblem no smaller than one-half (½) inch in diameter reading 'Made in Florida'.

"(2) If a Florida distiller shall be an individual or copartnership, such individual or copartnership shall be deemed to be conducting distilling operations in a state other than Florida in the event the individual or any member of the copartnership is interested or connected, directly or indirectly, or if such distiller produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any corporation which is engaged, directly or indirectly, or through any subsidiary or affiliate corporation, including any stock ownership as set forth in subsection (3) of this section, in distilling spirituous liquors in any state other than the state of Florida.

"(3) If a Florida distiller shall be a corporation, such corporation shall be deemed to be engaged in distilling operations in a state other than Florida when such corporation is affiliated with, directly or indirectly, or if such distiller produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any

therein; and (c) the lower court erred by limiting Old Florida Rum's participation as an intervenor to the rights of an amicus curiae, with the exception of the right to appeal, and further erred by denying Old Florida Rum's motion for a continuance of the hearing on the Motion for Summary Judgment.

The arguments of appellant-intervenor Old Florida Rum that the trial court erred in not allowing it to intervene with full rights of a party to the action, and in failing to grant a continuance on the hearing relating to entry of the summary judgment, are entirely without

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other corporation, which is engaged in distilling spirituous liquors in any state other than Florida, or when such corporation is controlled by, or the majority of stock therein is owned by another corporation, which latter corporation owns or controls in any way the majority of stocks or controlling interest in any other corporation which is engaged directly or indirectly in distilling spirituous liquors in any state other than the state of Florida.

"(4) If a Florida bottler is an individual or copartnership, such individual or copartnership shall be deemed to be conducting bottling operations in a state other than the state of Florida in the event the individual or any member of the copartnership is interested or connected, directly or indirectly, or if such bottler produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any corporation which is engaged, directly or indirectly, or through any subsidiary or affiliate corporation, including any stock ownership as set forth in subsection (5) of this section in bottling spirituous liquors in any state other than the state of Florida.

"(5) If a Florida bottler shall be a corporation, such corporation shall be deemed to be carrying on bottling operations in a state other than the state of Florida when such corporation is affiliated with, directly or indirectly, or if such bottler produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any other corporation which is engaged in bottling spirituous liquors in any state other than the state of Florida, or when such corporation is controlled by or the majority of stock therein is owned by another corporation which latter corporation owns or controls in any way the majority of stocks or controlling interest in any other corporation which engaged directly or indirectly in bottling spirituous liquors in a state other than the state of Florida."

merit. The sole reason for initiation of the proceeding was to test the constitutional validity of the classification scheme in Section 1 that determines the excise tax rate to be collected from appellees Hartley and Parker and other licensed Florida distributors by virtue of their sale of Mr. Boston products. The excise tax rate applicable to sale of intervenors' products was not in issue. The summary judgment did not involve adjudication of any matter in which the intervenors have a direct and immediate interest justifying their intervention as full parties to the action.

The interest which entitles a person to intervene in a cause between other parties must be shown to be in the matter in litigation. It must be direct and immediate. The intervenor must show that he will gain or lose by the direct legal operation and effect of the judgment. A showing of indirect, inconsequential or contingent interest is wholly inadequate and is, at most, the only possible interest disclosed by the attempted intervenors. It is doubtful that the trial court had the power to do more than allow briefs and arguments as amicus curiae. The action allowing such parties to appeal is highly questionable but in the present posture of the litigation—the state itself having properly vested jurisdiction here by appeal—both propositions are academic and merit no further comment.[2]

The trial court held that subsection (5) of Chapter 70-225, Laws of Florida, was void because its title did

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[2]See Krouse v. Palmer, 131 Fla. 444, 179 So. 762 (1938); Florida Gas Co. v. American Employers' Insurance Co., 218 So.2d 197 (3d Dist. Ct. App. Fla. 1969); and United States v. State of Florida, 179 So.2d 890 (3d Dist. Ct. App. Fla. 1965). 39 Am.Jur.Parties, Section 61 (1942), and cases cited therein.

not meet the requirements of Article III, Section 6, of the Constitution of Florida—1968 Revision.[3] We find that the title as a whole, and in particular the addition of the phrase "and providing certain other limitations. . ." was sufficient to place the complaining parties on notice of the full contents of the act and adequately met the requirements of Article III, Section 6, that "the subject shall be briefly expressed in the title." Any person operating a business enjoying the favorable tax treatment of Chapter 561, Florida Statutes, who read the title of this bill should have been adequately notified that his operation might be affected in some manner by the legislation.

No useful purpose would be served by an extended discussion of the law pronounced in scores of cases on this question as related to and measured by the particular provision of this act and the contents of the title thereto. Our examination of both convinces us that the title gives fair notice to the public and the members of the Legislature that should reasonably lead to further inquiry into the body of the act. This satisfies the requirements set down by this Court in King Kole, Inc. v. Bryant:[4]

> "The primary purpose of the requirements [of the Constitution in regard to title of acts] is

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[3]"Laws. Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: 'Be It Enacted by the Legislature of the State of Florida:' " Fla.Const. Art. III, Section 6 (1968).

[4]178 So.2d 2, 4 (Fla. 1965). See also Gray v. Central Florida Lumber Co. 320 Fla. 103, 140 So. 320 (1932), and State ex rel. McQuaid v. County of Duval, 23 Fla. 483, 3 So. 193 (1887).

to prevent 'hodge-podge or log-rolling' legislation. Its object is to avoid surprise or fraud by fairly apprising the Legislation and the public of the subject of the legislation being enacted. . ."

Having determined that the title to the act adequately encompassed the subject matter appearing in subsection (5) of Chapter 70-225, Laws of Florida, and having determined that Old Florida Rum's argument that it was denied proper participation in the case is without merit, we now consider whether the trial court properly found subsections (1) and (5) of Chapter 70-225 in violation of the equal protection provisions of Article, I Section 2, of the Florida Constitution—1968 Revision.

Subsection 1 of section 1, Chapter 70-225, Florida Statutes, provides, inter alia, for certain excise tax rates on alcoholic beverages, favoring those beverages manufactured in Florida exclusively from raw materials produced in Florida, (except for flavoring extracts) and not blended with out of state whiskey. A further condition or prerequisite to qualifying for the preferred or reduced rates fixed in the act, in addition to exclusive use of the Florida raw materials as pointed out supra, the said act provided that such beverage must be (1) either distilled and bottled by a distiller licensed under section 561.35(1) (d) and (f) who conducts distilling operations only in the state of Florida, and in no other state, or (2) bottled by a bottler licensed under section 561.35(1) (e) who conducts bottling operations only in the state of Florida and in no other state, and that such beverage bear a Florida Sunburst emblem. By subsections 3 and 5 of section 1 of said act, the Legislature made a legislative

definition as to what would constitute distilling operations and/or bottling operations in a state other than the state of Florida, so as to preclude such distiller or bottler from being entitled to the benefits of the special excise tax in question. Subsections 3 and 5 are quite lengthy and go into minute detail for clarity and guidance to affected corporations. These subsections are as follows:

> "(3) If a Florida distiller shall be a corporation, such corporation shall be deemed to be engaged in distilling operations in a state other than Florida when such corporation is affiliated with, directly or indirectly, or if such distiller produces an alcoholic beverage sold under a brand name identical or deceptively similar to the brand name of any other corporation, which is engaged in distilling spirituous liquors in any state other than Florida, or when such corporation is controlled by, or the majority of stock therein is owned by another corporation, which latter corporation owns or controls in any way the majority of stocks or controlling interest in any other corporation which is engaged directly or indirectly in distilling spirituous liquors in any state other than the state of Florida."

> "(5) If a Florida bottler shall be a corporation, such corporation shall be deemed to be carrying on bottling operations in a state other than the state of Florida when such corporation is affiliated with, directly or indirectly, or if such bottler produces an alcoholic beverage sold under a brand name identical or deceptively similar to

> the brand name of any other corporation which is engaged in bottling spirituous liquors in any state other than the state of Florida, or when such corporation is controlled by or the majority of stock therein is owned by another corporation, which latter corporation owns or controls in any way the majority of stocks or controlling interest in any other corporation which is engaged directly or indirectly in bottling spirituous liquors in any state other than the state of Florida."

Prior to the passage of Chapter 70-225, a preferred or reduced excise tax rate was granted on spirituous beverages produced from Florida products. This was the only criteria necessary to qualify for the lower tax rate. According to an Attorney General's opinion in 1969, blending of out of state whiskey with Florida grown distilled spirituous beverages was permitted, which could have a serious impact upon both the enforcement of the Act and the amount of state revenue. In order to overcome these factors, the appellant, the Board of Business Regulations, sought legislative relief by modification of the then existing law so as not to prejudice the tax revenue of the State of Florida. Chapter 70-225 is the Legislature's answer to this problem.

Mr. Boston Distiller Corp. and Hartley and Parker, Inc., (distributors for Mr. Boston), have by complaint for a declaratory judgment attacked the constitutionality of said Chapter 70-225 inter alia, insofar as it affects the tax rate to be paid by them on their products, alleging inter alia, that the new standards for determining whether their products qualify for the lower rates of excise taxation are such unreasonable, arbitrary, capricious and con-

fiscatory classifications as to be violative of the Equal Protection and Due Process Provisions of the Constitutions of Florida and of the United States, particularly the provisions of subsections 1 and 5 of section 1 of said Act.

The lower court held the following portion of subsection 1 of section 1 of Chapter 70-225:

> ". . . such beverage must be either distilled and bottled by a distiller licensed under Section 561.35(1)(d) and (f), who conducts distilling operations only in the State of Florida and in no other state, or bottled by a bottler licensed under Section 561.35(1)(e) who conducts bottling operations only in the State of Florida and in no other state. . ."

void and inoperative because it is in violation of the equal protection clause of section 2, Article I, Constitution of Florida in that it makes an unreasonable "classification of persons for the purpose of taxation." The court stated in its order in support of its holding the classification to be unreasonable, an erroneous statement of the statutory provision. The court said: "All liquors to be taxed at the lower rate must be distilled in Florida from Florida products. All must be bottled in Florida." This is an incorrect statement of the provisions of subsection 1 of Section 1 of said Act. The correct statement as found in said subsection is to the effect that the beverage must be either distilled and bottled by a distiller . . . who conducts distilling operations in no other state than Florida or be bottled by a bottler licensed under Florida law, who conducts bottling in no other state. The distinction is that it must be bottled by a bottler who does not carry on the

same operation in another state. It appears to us that this is a reasonable classification to meet the avowed purpose stated by the Board of Business Regulations as its need for the Act in question in order to safeguard the tax revenue of the state. We can easily visualize the difficulty of policing an out of state bottling operation to ascertain that there are no mixing or blending with out of state whiskey which could so easily prejudice the tax revenue of the state.

As pointed out by the appellants, this court has in the past on numerous occasions upheld the validity of special tax exemptions or rates which were granted for the purpose of encouraging state industry. In the instant case, it is significant that only a small investment would be necessary to carry on an operation such as that of the appellee Mr. Boston, which could be suspended or closed for any reason or indication of economic losses, whereas, the larger investments, with an attendant larger tax, such as that of the two other interested distillers and/or bottlers, where the total bottling operation was in Florida, would render impracticable or unfeasible such suspension or closing.

The limiting of the classification to bottlers who bottle exclusively in Florida, is not an unreasonable classification nor does it violate the equal protection and due process provisions of the Florida and United States Constitutions. All that the appellee, Mr. Boston, has to do to qualify equally with the other two named bottlers is to meet the same statutory requirements. There are no special benefits going to one Florida based producer over another Florida based producer.

This court in Jacksonville Gas Co. v. Lee, 140 So. 320 (Fla. 1932), said:

> "Excise taxes may be imposed upon some corporations and not upon others, and some corporations may be required to pay more kind of excise taxes than other corporations when the classifications for the taxes have a reasonable basis and are not arbitrarily imposed on some and not on others . . ."

Again, we find this statement of this court in King Kole, Inc. v. Bryant, 178 So.2d (1965):

> "It is sufficient to note that the power to classify for purposes of excise taxation is of wide range and flexibility. Once exercised it will not be disturbed unless the result is plainly unequal, arbitrary or discriminatory . . ."

When considered in the light of the avowed purpose for the adoption of the Act in question as stated by the appellant, Board of Business Regulations, i.e., to protect state revenue, and applying the broad guidelines enumerated in the last two preceding citations, supra, from this court, we must disagree with the trial court's finding that the equal protection and due process provisions have been violated.

In State ex rel. Southern Brewing Company v. Long, 181 So. 421, this court was confronted with a statute which imposed a tax of seven cents per gallon on malt beverages when sold in bulk or seven-eighth (⅞) of a cent per pint

or fraction thereof when selling in containers of less than one gallon. The plaintiff contended that said statute was unconstitutional on the ground that the tax was dependent upon the method of doing business. The court rejected this contention and held that the acts did not require anyone to sell by a prescribed method, but merely classified two methods of sale and permitted the manufacturer or distributor to choose the method he preferred. The court said:

> "Both classes are limited by prescribed rules, but all in the class regulated alike. It is not shown that the classification is arbitrary or works unequally on the persons affected."

The court in said case held the Act complained of to be a reasonable exercise of the police power. In the case sub judice the tax rate imposed is dependent on the manner in which the manufacturer or bottler of the beverage elects to do business. If the distiller or bottler is an integral part of a nationwide or at least an interstate distiller or bottler, as defined in subsections 3 and 5 of Section 1 of Chapter 70-225, using similar brand names and possibly blending with out of state whiskey, (which can't be reasonably detected by the Board of Business Regulations), and such distiller or bottler, although he uses only alcohol made from raw Florida material, prefers to retain the advantages of the joint ownership with the out of state distiller or bottler, then the consequences thereof is the loss of the preferential tax rate. It is a choice not imposed by statute but by the affected corporations' chosen method of doing business. This does not constitute an arbitrary discrimination.

In the case sub judice, the lower court had before it a sworn complaint and a motion for summary judgment

accompanied by two affidavits, one from an officer of Mr. Boston and one from an officer of Hartley & Parker, Inc., each of which mainly verify portions of the complaint only, and limit their complaint to the fact that if Mr. Boston is subjected to the regular excise tax on alcoholic beverages instead of the preferential tax provided in Chapter 70-225, the price differential necessarily to follow would result in a decrease in the sale of the product of Mr. Boston. These affidavits do not attempt to show any reason why Mr. Boston cannot or will not restructure its operation so as to meet the requirements of said Act.

It appears to us that if the preferential tax break given on alcohol beverage manufactured exclusively from Florida raw material is valid, even though the same is much lower than the identical or similar products not using exclusively Florida raw material, then the same would hold true in limiting those entitled to the preferential treatment to exclusive Florida based bottlers or distillers. The appellees have not complained of the portion of the Act dealing only with the raw Florida material.

The Legislature is given rather wide latitude in determining methods of providing tax revenue for the state as well as in granting encouragement to new Florida based industry, and when Acts are passed for these purposes as well, of course, as other purposes, all reasonable presumptions are in favor of the constitutionality of such acts. This court has ably set forth rules by which all courts should be bound in determining the constitutionality of an act in the case of Gray v. Central Florida Lumber Co., 140 So. 322, wherein we find this language:

> "(1) On its face every act of the Legislature is presumed to be constitutional; (2) every doubt as to its constitutionality must be resolved in its favor; (3) if the act admits of two interpretations, one of which would lead to its constitutionality and the other to its unconstitutionality, the former rather than the latter must be adopted; (4) the constitutionality of a statute should be determined by its practical operation and effect; (5) in determining its constitutional validity, courts should be guided by its substance and manner of operation rather than the form in which the act is cast; and (6) after indulging all presumptions in favor of the act; if it is found to be in positive conflict with some provision of organic law, it becomes the duty of the court to strike it down."

Also in Tyson v. Lanier, 156 So.2d 833, which upheld the validity of the so-called "Green Belt Law" this court said:

> "We are required to look for a reason to uphold the act and to adopt any reasonable view that will do so."

It appears to us that the classifications made by the Legislature are neither unreasonable nor discriminatory; but treat all like parties equally, and certainly when viewed in the light of the guidelines enumerated supra in Gray v. Central Florida Lumber Co., we are compelled to hold that Chapter 70-225 F.S. is constitutionally sound and valid and a proper exercise of legislative authority. It was error for the lower court to hold otherwise.

Accordingly the judgment of the lower court is affirmed in part and reversed in part and remanded for further consideration not inconsistent with this opinion.

It is so ordered.

CARLTON, ADKINS and BOYD, JJ., and SPECTOR, District Court Judge, concur
DREW, J., concurs specially with opinion.

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DREW, J.—Concurring Specially

I concur in the decision and judgment in this cause, but in so doing I wish to record my views on one facet of this litigation which appears to have been overlooked by all the parties to the cause.

This is one of the first cases to appear before the Court involving equal protection under the 1968 Revision of the Florida Constitution. The equal protection guarantee appeared in the 1885 Constitution as Section 1 of the Declaration of Rights, and read as follows:

> "Section 1. All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursueing [sic] happiness and obtaining safety." [Emphasis added.]

A similar guarantee appears in the 1968 Revision as Section 2 of Article I, "Basic Rights":

> "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or religion." [Emphasis added.]

"All men" were guaranteed equal protection by the 1885 wording, whereas in the 1968 Revision that guarantee is now afforded "all natural persons". By including the term "natural", the drafters of the 1968 Revision have retained in different words the meaning of "all men" used in the 1885 version, thereby continuing to exclude application to artificial "persons" created as legal fictions, such as corporations.[1] But just as the section does not grant equal

[1]The term "all persons" was used in the draft submitted to the Legislature by the Constitution Revision Commission. Addition of the word "natural" was offered as an amendment by the Liaison Committee, and was subsequently adopted by both Houses and included in the final draft approved by the People. The amendment was submitted to the House of Representatives, sitting as the Committee of the Whole, by The Honorable Richard Pettigrew, Chairman of the Liaison Committee, who offered the following explanation: Rep. Pettigrew: ". . . Those would be the changes, plus one other that, it is my understanding, editorial and drafting committees of the two Houses have recommended. There is some concern that the word 'persons' includes corporations in Section 2 'Basic rights,' and it is recommended that the word 'natural' be added before the word 'persons' in the first line and the first sentence of Section 2, so that the word would be 'all natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, and to be rewarded for industry, to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or

protection to a corporation, likewise it cannot—and does not pretend to—take away the corporation's well-established right to equal protection granted by Section of the Fourteenth Amendment to the United States Constitution.[2]

By these remarks I merely point out that denial of equal protection to a corporation necessarily refers to the guarantee in Section 1 of the Fourteenth Amendment to the United States Constitution, rather than Article I, Section 2 of the Florida Constitution—1968 Revision.

ROBERTS, Acting Chief Justice, concurs.

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religion.' That would be the entire Section 2." * * * Rep. Scarborough: "Mr. Pettigrew in 620 here, two questions in Section 2. You've added the word 'natural persons.' Why do you need 'natural'? What is . . ." Rep. Pettigrew: "The word 'natural' persons is to— In law at the present time, Mr. Scarborough, 'persons' includes corporations. It's a fiction that's developed . . ." Rep. Scarborough: "All right, that answers that question." Rep. Pettigrew: "In law, and it was a very important legal fiction, so that's the reason we are doing it to exclude their having the rights guaranteed under the basic rights provision." Rep. Scarborough: "Very good." From unofficial tape recording of the House of Representatives sitting as the Committee of the Whole, meeting on August 26, 1967, on file in the Library of the Supreme Court.

[2]U.S. Const., Art. VI; Louis K. Liggett Co. v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929, 85 A.L.R. 699 (1933). See Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 282 (1914); State v. Atlantic Coast Line Ry. Co., 56 Fla. 617, 47 So. 969 (1908); and Seaboard Air Line Ry. v. Simon, 56 Fla. 545, 47 So. 1001 (1908). See also, Ward Baking Co. v. City of Fernandina, 29 F.2d 789 (5th Cir. Fla. 1928).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

NO.

MR. BOSTON DISTILLER CORP. and CONSOLIDATED DISTRIBUTORS OF TAMPA, INC.,

Petitioners,

-vs-

RICHARD A. PALLOT, JACK C. DEMETREE, NELSON A. ITALIANO, B. W. SIMPKINS, and J. H. BAROCO, as members of and constituting the BOARD OF BUSINESS REGULATION of the State of Florida,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I

CAN THE ABSTENTION DOCTRINE BE APPLIED TO A CASE TO WHICH THE TAX INJUNCTION ACT, TITLE 28 USC, §1341 APPLIES TO DENY JURISDICTION IN A FEDERAL DISTRICT COURT TO PASS UPON FEDERAL CONSTITUTIONAL RIGHTS AFTER STATE COURTS HAVE DENIED RELIEF?

Petitioner has voluntarily and without reservation submitted the same federal constitutional question to the state courts of Florida, as was presented to the federal district court, and such question was finally determined on the merits by the Florida Supreme Court. Earl Faircloth v. Mr. Boston Distiller Corp., 245 So.2d 240 (1970). Petitioner did not seek review of said decision by the United States Supreme Court.

In Davis v. Adams, 315 F. Supp. 1293 (1970), an injunctive action was brought in the Federal District Court after a State Supreme Court had reached a final decision on the merits. The Federal District Court held that it had no jurisdiction to directly review a final determination of a federal constitutional question voluntarily submitted to and decided by the Supreme Court of Florida, regardless of whether review by the United States Supreme Court had been sought. Further, in Brown v. Chastain, 416 F.2d 1012 (1969) an action was brought in Federal Court seeking a mandatory injunction requiring the State to provide a free transcript for a civil appeal from a state court, involving a claim that denial of the transcript violated Plaintiff's constitutional rights. The Court held that it had no jurisdiction to directly review a final determination of a federal constitutional question, voluntarily submitted to and decided by state courts in state court litigation and with respect to which no review by the United States Supreme Court has been sought.

The Petitioners are simply attempting to re-litigate their federal constitutional claims which were litigated and determined in the state courts. The present proceeding is

obviously an afterthought as evidenced by the time span which has lapsed after the decision of the State Supreme Court on the same issues presented by the Petitioners in the case sub judice. The effect of the Petitioners' suit for injunctive and declaratory relief in the federal district court was to seek review by said Court of the state court's decision on the merits in the case of Earl Faircloth v. Mr. Boston Distiller Corp., cited supra. The Federal District Court does not possess appellate jurisdiction over state courts. Rooker v. Fidelity Trust Co., 263 U.S. 413, 445 S.Ct. 149; 68 L.Ed. 362 (1923). As stated in Pilkinton v. Pilkinton, 389 F.2d 32 "... it is plainly evident that what appellant seeks in this original action is a review by the federal courts of the proceedings of the ... [Florida] state courts in the divorce action. Federal courts are without authority to function as an appellate arm of the state courts."

"State courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts." Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, 325.

To the same effect, see Eitel v. Faircloth, 311 F.Supp. 1160 (1970).

Petitioner sought relief in the state courts voluntarily and without reservation. Petitioner could have brought his original suit for declaratory and injunctive relief in the Federal District Court, and if it was there determined that the District Court did not have jurisdiction over the cause, for

whatever reason, the District Court could have then held the case in abeyance until after the Petitioner had exhausted his state remedies. The point is that in the cases that have been cited by the Petitioners, suit was brought first in Federal District Court and upon a determination by such court that it did not have the jurisdiction over the case, the court held the case in abeyance until after the state remedies had been exhausted. See also England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 440 (1964); NAACP v. Button, 371 U.S. 415 (1963).

In the case sub judice, the Petitioner made no such effort. Since the Petitioner did not make the initial attempt to have his federal constitutional question reviewed in the Federal District Court, the cases and propositions cited by Respondent are controlling and the Federal District Court was without jurisdiction to consider this cause.

II

CAN THE DOCTRINE OF RES JUDICATA BE APPLIED TO A SUIT WHERE THE PARTIES IN THE SUIT ON THE BASIS OF WHICH RES JUDICATA IS ASSERTED ARE NOT IDENTICAL TO THE PARTIES IN THE SUIT AT BAR?

In the present case, the constitutionality of the statute in question has been determined by the highest court of the State of Florida. The Petitioners sought to have the District Court convene a Three-Judge Court to exercise appellate review of a decision of the Florida Supreme Court. Under the circumstances as heretofore stated res judicata applies and prevents further

consideration by the federal courts. Autokefalos Orthodox Spiritual Church of St. George, The Tropeophoros v. Hallahan, 103 F. Supp. 389 (1952); Paul v. Dade County, 419 F. 2d 10 (5th Cir. 1969); Davis v. Adams, 315 F. Supp. 1293 (1970); Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149; 68 L.Ed. 362 (1923); Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, 325.

III

CAN A SINGLE JUDGE OF A UNITED STATES DISTRICT COURT REFUSE TO REQUEST THE CONVENTION OF A THREE JUDGE DISTRICT COURT WHERE THERE IS NO QUESTION BUT THAT THE ALLEGATIONS OF THE COMPLAINT RAISE A SUBSTANTIAL QUESTION OF CONSTITUTIONALITY?

Title 28, §2281, United States Code, provides that an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute, shall not be granted by any District Court or judge thereof, upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a District Court of three-judges. Petitioners contend, that pursuant to said section, the District Judge should have convened a Three-Judge Court to determine the question of jurisdiction.

The clear and obvious prohibition of §2281 is that a single District Judge may not rule on the unconstitutionality of a state statute, however, such section, as clearly, does not prohibit a District Judge from ruling on the threshold question of jurisdiction. Such section does not require, or even contemplate, that a Three-Judge Court be convened to

consider a question of jurisdiction. §2281 requires that a Three-Judge Court must be convened only to consider the question of the constitutionality of the state statute. Ex Parte Poresky, 290 U.S. 30, 54 S.Ct. 3 (1933).

Section 2281 must be narrowly read in light of burden of federal judiciary imposed by Three-Judge Courts. Pederson v. Breier, 327 F.Supp. 1382 (1971)

Section 2281 should not be construed liberally as a measure of broad social policy. It is a technical enactment to be applied as such, and the section must be applied only in that narrow range of cases when it is strictly called for, and must be strictly construed. Sweeten v. Sneedon, 324 F. Supp. 1094 (1971); Rakes v. Coleman, 318 F.Supp. 181 (1970); Fremed v. Johnson, 311 F.Supp. 1116 (1970); Bussie v. Long, 254 F. Supp. 797 (1966).

The principal concern prompting the enactment of §2281 was the power of one Federal Judge to enjoin operation or enforcement of a state statute. Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970). Clearly a single District Judge is not enjoining the operation or enforcement of a state statute when he rules that the District Court does not have jurisdiction. §2281 was not intended to apply to the question of jurisdiction (see also Boone v. Wyman, 295 F.Supp. 1143, affirmed 412 F.2d 857, cert. denied 90 S.Ct. 600, 396 U.S. 1024.

CONCLUSION

The constitutionality of the state statute in question was voluntarily submitted to the state courts for disposition. The Petitioner should not be allowed to ignore the adverse state decision and start all over again in the

Federal District Court. The United States District Judge correctly decided the threshold question of jurisdiction, and his order of dismissal should be affirmed together with the court decision of the Fifth Circuit Court of Appeals that said order of dismissal was proper.

A review on Writ of Certiorari is not a matter of right, but is of sound judicial discretion and should be granted only where there is special and important reasons therefor. Therefore, jurisdiction to review the judgments and decrees of court of appeals by certiorari is to be exercised sparingly, and only in cases of gravity and general importance, or in order to secure uniformity of decision. Respondent respectfully suggests that Petitioner has not demonstrated any special or important reasons for this Court to issue its Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been mailed to GEORGE L. ONETT and SHALLE STEPHEN FINE, Attorneys for Petitioners, 1237 City National Bank Bldg., Miami, Florida, this _____day of April, 1973.

J. Riley Davis